

**PUBLIC INTEGRITY COMMISSION
MINUTES
June 18, 2019
10:00 a.m.**

1. Call to Order: 10:00 a.m. Present: William F. Tobin, Jr. (Vice-Chair—Acting Chair); Michele Whetzel (Vice-Chair); Commissioners: Andrew Gonser, Esq., Andrew Manus. Commission Counsel: Deborah J. Moreau, Esq.

2. Approval of Minutes for May 21, 2019: Moved—Commissioner Whetzel; seconded—Commissioner Gonser. Vote 4-0, approved.

3. Administrative Items

- A. Legislation: ID cards; HB 186—PIC will have no further involvement in the issuance of Lobbyist ID badges. The responsibility belongs to State officials and employees who work at Legislative Hall.
- B. Possible new appointees on 6/19—the Senate will have a confirmation hearing for The Honorable F. Gary Simpson on Wednesday.
- C. Status of Filling Expired Terms on the Commission—This was Andrew Gonser's last meeting. He was presented with an appreciation award for his dedicated service.

4. Motion to go into Executive Session¹ to Hear Requests for Advisory Opinions, Waivers and Referrals: Moved—Commissioner Manus; seconded—Commissioner Gonser. Vote 4-0, approved.

5. 19-26—Outside Employment

[Employee works for a State [Agency]. [Employee] was assigned to work in Kent and Sussex Counties. [Employee]'s primary responsibilities included *[job description has been omitted to protect the employee's confidentiality]*. [Employee] worked set shifts that rotated every three to four weeks, depending on staffing levels. For one of those three or four weeks he was on-call.

[Employee] wanted to accept a part-time position with [a local municipality]. His job duties would include [tasks similar to those he performed in his State job]. [Agency] did not have a contractual relationship with [the municipality] but did have regulatory oversight for [some] purposes. As a result, there could be occasions where [Employee] would be required to call upon [municipal employees] for assistance while performing his State job duties. [Employee] stated that the offer for part-time employment was on an 'as-needed' basis meaning he could select the hours he was available to work based upon his State work schedule. Under no circumstances would he accept part-time work during the week he was on-call.

[Employee] asked the Commission if his part-time work for [the municipality] would create a conflict of interest with his State job duties.

(A) Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). It was difficult for the Commission to imagine a scenario which would affect [Employee]'s judgment in his State position. While both positions involved [similar job duties], [Employee]'s State job was [focused on one area and the municipal employment was focused on a different area]. When considering whether it was possible that [Employee] would encounter [municipal co-workers] while working in his State capacity, the Commission surmised that the only way that could happen was if [Agency] was called upon to respond to [a situation in the municipality]. In that instance, [Employee] would be working in a collaborative effort with [the municipality], rather than adversarial, and it was difficult to see how his dual employment would interfere with his ability to perform his official duties.

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). [Agency] did not have a contractual relationship with [the municipality]. As a result, the Commission felt that it was unlikely that [Employee]'s colleagues from either job would have contact with each other. Therefore, the likelihood that [Employee]'s part-time work would result in preferential treatment being extended to anyone was very remote.

(3) official decisions outside official channels:

Given the different [focus] between the two positions, there did not appear to be any way [Employee] could influence official decisions outside official channels. That was not to say he would do so, he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

(4) any adverse effect on the public's confidence in the integrity of its government:

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

There were no obvious conflicts between the two sets of job duties which would be likely to negatively affect the public's confidence in their government. In further mitigation, [Employee]'s outside employment would be with another government entity, rather than a private entity. The public would be less likely to be concerned that [Employee]'s dual

employment would create an appearance of impropriety because it would be with another government agency.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated he would work at his part-time job outside of State work hours. The Commission reminded him that the prohibition not only applied to his physical presence, but also related to phone calls and paperwork.

Motion—No conflict between [Employee]’s State job and his proposed part-time employment. Moved—Commissioner Whetzel; seconded—Commissioner Gonser. Vote 3-1, approved (Commissioner Manus dissenting).

6. 19-23—Conflict of Interest

[Employee] was employed by a [Division] of a [State Agency]. He had been a State employee for 28 years. From September 2017 until May 2019, [Employee] was [a supervisor]. In May 2019, [Employee] was moved to a new position with the same pay. According to [Employee], he was removed from his position as the [supervisor] because he also contracted with [Agency] to provide [specific services]. His State supervisors advised [Employee] that because he was the [supervisor of a specific program], it was improper for him to contract with his [Division]. [Employee] was given the choice of ending his contractual status with [the Division] or moving to another State job. [Employee] reluctantly agreed to move to another job. [Employee] did not believe it was a conflict of interest for him to contract with [the Division] because he was given implicit permission to do so in 2007 by PIC.

In 2007, [17 State employees submitted a request for a waiver to allow them to contract with State agencies to provide a specific service]. The issuance of the waivers/opinions was put on hold because members of the General Assembly wanted to create a statute which would accomplish the same goal without the need for individuals to apply for a waiver from the State Code of Conduct. In 2008, [the General Assembly passed a law that would allow the employees to contract with their Division except for a few caveats built into the statute].

[Employee] was one of the 17 individuals that applied for a waiver in 2007 (17-15). [Employee] stated that because the Commission knew about his conflict in 2007, by virtue of his waiver application, and did not pursue an enforcement action against him, that he was given implicit permission to continue to [contract with his [Division] until the legislature carved out a statutory exception in 2008. In his written submission, [Employee] argued that the same conduct could not now be a conflict of interest.

[Employee] asked the Commission to decide that either: a) his status as a [contractor] did not conflict with his former job duties as the [supervisor] or b) to grant a waiver to allow him to continue to contract with [his Division].

1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." *Id.* Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

[The Division] decided that [Employee] had a conflict of interest once he was promoted to the [supervisory] position. In order to resolve the conflict, they moved him to another position. While [the 2008 statute] did give State employees permission to contract with the State, there were also a few caveats in the statute: [the employee could not review and dispose of matters related to the contract while performing their State job duties and they could not be subject to oversight by an employee more junior to them].

During the meeting, [Employee] stated that his work as a contracted provider had been approved by an employee in a position equal to, or higher than, his position as the [supervisor]. In addition, he stated that he did not review or dispose of matters related to [his contract] while performing his State job duties. As a result, the Commission decided that [Employee] qualified for the above cited exemption in the statute and did not need a waiver to contract with [the Division]. The Commission declined to interpret or decide whether [the Division] followed their own policy when transferring [Employee] to another position because that was not within the Commission's jurisdiction.

2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

It was unlikely that the public would perceive [Employee]'s dual roles as creating an appearance of impropriety because it fell within the statutory exemption designed to allow such conduct. As long as his work was approved by a [Division] employee of equal or higher status

than him and he did not review or dispose of matters related to his contractual work, his status as a contracted provider was well within the law.

Motion—[Employee] qualified for the statutory exemption carved out in [the statute] and therefore the Commission declined to consider his request for a waiver. Moved—Commissioner Manus; seconded Commissioner Whetzel. Vote 4-0, approved.

7. 19-25—Post Employment

[Employee] worked for a State [Agency] and his primary job duty was to inspect work being performed to ensure compliance with industry standards. [He was assigned to two specific projects].

[Employee] was considering accepting a position with [one of the Agency's Vendors]. He would be responsible for overseeing [the Vendor's contracts with his former Agency].

[Employee] asked the Commission if his proposed employment with [Vendor] would violate the two year post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission had approved post-employment positions for [Agency] workers who left State employment to work for one of the agency's contractors so long as they did not work on the same projects. *Commission Ops. 12-09 and 13-41*. The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

Obviously, [Employee] could not work on the two [projects] he most recently worked on while employed by [the Agency]. However, the Commission decided that he could work on any other State projects as a [Vendor] employee as long as it was not a project for which he was previously responsible while he was a State employee. Additionally, [Employee] could not appear before [the Agency's] bid committees for a period of two years. That did not mean he could not work on any bids, only that he could not appear in person before his former co-workers or colleagues.

The Commission also reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

Motion—[Employee] could accept a position with [Vendor] as long as he did not work on the two [Agency] projects he described. Moved—Commissioner Gonser; seconded—Commissioner Manus. Vote 4-0, approved.

8. 19-24—Personal Interest

[Employee] is [an upper level employee of a State Agency]. [The Agency] is comprised of many [separate divisions]. [Employee's] brother was hired by [a State vendor] to work on a State contract. Day-to-day oversight of the contract was managed by [one Division's] administrative staff who reported to a [Division Head]. [Employee] provided the Commission with an organizational chart.

[The Brother] applied, and was hired [by the Vendor]. [The Vendor had a management hierarchy between the Brother and the Vendor's] CEO. Should any disciplinary or corrective action be necessary, the action would proceed through three levels of [the Vendor's] supervisory review before it would be passed on to [the Agency]. There were another four layers of supervision between [Employee] and the [Division Head]. [Employee] stated that should a disciplinary action be necessary, [Employee] would not be involved in either [Vendor's] decision-making process nor provide input to [the Division's] staff.

1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated.

29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” *Id.* Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

The [familial] relationship between [Employee] and [Brother] was that of a close relative. 29 Del. C. § 5804(1). As a result, if [Employee] were to review or dispose of matters related to [the Brother], they would have a conflict of interest as a matter of law. However, given [the difference between the Employee’s job status and that of the Brother], the Commission decided it would be unlikely that [Employee] would be called upon to review [the Brother’s] work. First, because of the difference between their two sets of job duties and second, because of the many layers of supervision between [Employee]’s position and [the Brother’s] position. The Commission decided that the numerous layers of supervision between the two positions constituted an acceptable method of recusal which would prevent [Employee] from reviewing and disposing of matters related to [the Brother’s] job performance.

2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

The Commission decided that the circumstances surrounding [the Brother’s] employment (i.e. the multiple layers of supervision and the fact that he worked for [Vendor] even though he was assigned to the [Agency’s] campus) would mitigate any impression of impropriety which may be created amongst the public.

Motion—No conflict under these circumstances. If the circumstances of [Employee’s brother] employment changed, [Employee] should return to the Commission for further advice. Moved—Commissioner Gonser; seconded—Commissioner Whetzel. Vote 4-0, approved.

9. Motion to go out of Executive Session: Moved—Commissioner Whetzel; seconded—Commissioner Manus. Vote 4-0, approved.

10. Adjournment

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.